

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 46 of 1988

in

SPECIAL CIVIL APPLICATION No 1872 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

and

Hon'ble MR.JUSTICE C.K.BUCH

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

GANDHI ROAD LINES

Versus

COLLECTOR OF BANASKANTHA

Appearance:

MR SURESH M SHAH for Appellants

MR BY MANKAD, AGP for Respondent No. 1, 2

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE C.K.BUCH

Date of decision: 10/12/98

ORAL JUDGEMENT [PER : B.C. PATEL, J]

A partnership firm carrying on business of

transport filed a writ petition in this court challenging the order of forfeiting the deposit by an order dated 24.1.1986 passed by the Collector. Learned Single Judge considering the submissions made by learned counsel appearing for the petitioner, dismissed the same vide order dated 7.9.1987. Hence present appeal.

The appellant and the Banaskantha Jil Sahakari Kharid Vechan Sangh (hereinafter referred to as the Sangh) entered into an agreement on 5.6.1984 at Palanpur. The State Government was allocating quota of sugar and sugar products for proper distribution thereof in the districts of the State. From the preamble of the contract, it appears that transporter-appellant was entitled to get transport charges of sugar per kilometer per ton. Six slabs are stated in the preamble for different charges according to the distance. As per the conditions, the appellant was required to lift sugar from the factory situated within the State of Gujarat or from any other place or from the godown and was required to supply at various shops and/or godowns of Nominee. The appellant was also required to see that the quota of sugar allocated is not lapsed. Condition No. 2 of contract provided for a dispute with regard to the charges to be paid considering the distance and that the decision of the Collector shall be final. Condition No.6 of the contract fastened the appellant with liability if damages are suffered by the nominee. The appellant if not transporting the sugar as agreed, the nominee was required to purchase sugar from open market and was required to get it transported, and the appellant was liable to pay the entire amount with costs. Condition No.13 provided for forfeiture of the amount deposited either in part or in full by the Collector.

Appellant annexed Annexure:B along with the petition, inter alia, pointing out that a notice was issued calling upon the appellant to show cause as to why

the amount should not be recovered from him and why it should not be adjusted from the deposit, on the ground that as per condition no.1, though the appellant was required to lift sugar from the factory situated within the State of Gujarat or out side the State of Gujarat or from any godown, in November 1984, the appellant refused to transport levy sugar from the godown situated at Kandla. It appears that appellant stated that the market rate being 0.36 ps. per kilometer per ton, he would lift only if that rate is offered. In September 1984 also, as he failed to lift and transport sugar, by paying higher

charges, the same was transported. In the notice, it was also pointed out that the appellant entered into similar contracts for transporting the sugar to other districts at the same time and he was transporting from Kandla.

The appellant has thereafter annexed Annexure:C -order dated 24.1.1986 wherein in the concluding portion of the order, the Collector, as per condition No.13 of the contract, forfeited the amount of Rs.1 lakh. Pointing out to the court notice Annex.B to the effect that the charges only were to be recovered from him, it was submitted that it was not proper for the Collector to forfeit the entire amount of Rs. 1 lakh and, therefore, the order is bad.

Prima facie, submission made by learned counsel appearing for the appellant is very attractive. But, suffice it to say that in the order, there is a reference to other correspondence and that correspondence not being placed before the Court by the appellant, it can be said that it is nothing but suppression of material fact. In

the order, there is a reference to other breaches committed by the appellant which is clear from the annexure to the order at page 24 of the petition. It is pointed out that on account of inaction of the appellant, in all 1511 tons of sugar quota had lapsed.

Learned counsel Mr. Shah submitted that so far as the transactions with regard to Kankrej and Tharad for the months of August 1985 and October 1985 are concerned, could not be said to be the subject matter of the contract and that quota cannot be included. Considering this submission, 1331 tons of sugar quota lapsed because of inaction of the appellant. On page 25, by pointing out several instances, it is shown as to how nominee was required to spend higher amount for transporting sugar. Thus, what is required to be considered is that the people of Banaskantha who were the real beneficiaries, were deprived of the quota of sugar and they were required to purchase from open market by paying higher price. That aspect certainly requires to be taken into consideration.

Learned counsel Mr. Shah has submitted that the appellant committed no breach of contract and Government had no power to decide whether the breach is committed by the appellant more particularly when the Government itself was a party to the contract. He further submitted that the order Annex.C which is the subject matter of this petition, is an order passed in violation of principles of natural justice and, therefore also, the order must be quashed and set aside. Alternatively, he

submitted that looking to the nature of the agreement, the Collector could have forfeited the amount to the extent to which damage was suffered by the nominee and not further. He also submitted that a request was made to refer the matter to an Arbitrator in his letter and the Collector ought not to have passed an order at Annex.C and ought to have referred the same to an Arbitrator.

On broad principles, it must be noted that application under Art.226 of the Constitution of India is not maintainable for enforcement or breach of contractual rights against a party to the contract irrespective of the fact whether such a party is a private individual or the State because such dispute involves questions of facts which can be investigated in a suit rather than in the writ proceedings. Keeping this accepted position, one has to examine the facts and circumstances of the instant case.

The contract which is placed on record at Annex.A clearly reveals that the appellant entered into an agreement with the Banaskantha Jilla Sahakari Kharid Vechan Sangh, Palanpur for transporting sugar as per the conditions mentioned in the agreement at Annex.A. Appellant certainly did not enter into an agreement with the Collector- respondent no.1. The appellant, for the reasons best known to it, has not joined the Sangh as party to the proceedings despite the fact that the appellant entered into an agreement with it. It was the responsibility of this nominee to distribute sugar allocated for Banaskantha district. It was this nominee who would make grievance before the Collector if

appellant failed to act in accordance with the agreement. The Collector, of his own, would not come to know that the appellant has committed a breach or breaches of the agreement. It was necessary for the appellant to join Sangh as a party in whose favour the agreement was executed. The Collector, on consideration of all the facts placed before him, has exercised powers under Condition No.13 of the agreement. Under the circumstances, it was necessary to join said nominee as a party- respondent.

Mr. Shah, learned counsel appearing for the appellant has submitted that the appellant has committed no breach of contract and whether breach is committed by the appellant or not, cannot be decided by the Government more particularly when the Government was party to the contract. It clearly transpires from Annex.A that on behalf of Sangh, its Manager entered into an agreement

with the appellant i.e. Shyamlal Hiralal Chaudhary as a Manager, who has signed on behalf of the appellant. Mr. Shah, learned counsel when questioned as to how it can be said that the Collector was a party to the agreement? He stated that the tenders were invited by the Collector and the Collector was a party to it and in the petition, it is mentioned that respondent no.1 Collector invited tenders for transporting sugar for the period 1984-85 and in response thereto, the appellant submitted its tender and the same being the lowest, was accepted which was approved by the Director of Civil Supplies on 29.5.1984. It is required to be noted that under the Essential Commodities Act, it is the responsibility of the State to

see that there is efficient and proper distribution of essential commodities to the public at large and particularly to the poor section of the society as such persons cannot buy sugar from the open market by paying higher price. In view of the aforesaid policy of the State Government, when quota is fixed, it becomes the duty of the State to see that proper agency is appointed for the purpose of distribution and with that purpose, if advertisement is given, it cannot be said that the appellant has entered into an agreement with the State more particularly when in the agreement, there is nothing to show that the Collector was a party to the agreement. On the contrary, agreement indicates that nominee as well as the appellant left the matter at the discretion of the Collector in case the breach is committed or in case there is a dispute regarding distance and charges and, therefore, we do not find any merits in the submission that the Collector was a party to the agreement.

So far as the contention with regard to breach having been committed or not, one has to read the agreement as it is. Agreement clearly indicates that (i) the appellant was required to lift sugar from the factory situated within the State of Gujarat or out side Gujarat; or (ii) from any godown and (iii) was obliged to deliver the same to the shops and godowns of the nominee and within time stipulated so as to see that quota does not lapse. This clearly indicates that the appellant was required to lift the quota of sugar not only from the factory situated within the State of Gujarat, but from the factory situated out side the State of Gujarat and

godowns situated any where. There is justification for this as the amount of carting is to be paid according to the distance and weight of sugar lifted and transported from one place to other place. If the distance is up to 25 KM, then rate offered is per quintal. However, if the

distance is more than 26 KM, then upto 300 KM, the charges offered are 0.1 ps. per KM per ton and if distance is more than 301 KM, charges offered are at Rs.00.15.7 ps. per KM per ton. Thus, he was required to transport sugar from the factory situated within the State of Gujarat or out side the State of Gujarat or from any godown or godowns (not necessarily godown of a factory) and he was required to be paid as per the distance and quantity lifted.

Mr.Shah, learned counsel has submitted that this Court is not called upon to decide whether breach is committed or not, but his submission is that there must be independent agency to decide that the breach is committed. When the submission is made before the Court that the appellant has not committed any breach and looking to the agreement, it clearly transpires that the breach is committed, then the Court is expected to give its finding and, therefore we do not find any merits in the submission.

Mr. Shah has further submitted that the order Annexure:C is required to be quashed and set aside on the ground that the said order is passed in violation of the principles of natural justice. We have indicated earlier that after notice dated 16.11.1984, there is further correspondence and notice given to the appellant

and that is very clear from the order dated 24.1.1986. Mr. Shah has submitted that that itself is not sufficient. Annexure:C clearly indicates that in the month of September 1984, there was allotment of sugar and the appellant was required to lift the same from Kandla. On account of his failure despite the telegram dated 14.9.1984 to lift the quota of sugar, he failed to lift and transport the said quota of sugar and he was conveyed information that if he fails in transporting sugar, the amount required to be paid to the transporter shall be recovered from the amount of deposit. It is in reply thereto the appellant came out with a case that he was required to lift sugar from any factory or godown of a factory within the State or out side the State and to transport the same to the shops and godowns of the nominee. However, as per condition no.2, for transporting quota of sugar for Banaskantha district, names of places were given, and there is mention of factories, but there is no mention of Kandla Port and, therefore, appellant was not supposed to lift sugar from Kandla. He further stated that he is willing to lift, if he is offered rate at Rs.0.36 ps (instead of Rs.0.15.7 paise). From the order, it appears that to mislead the Government, list of vehicles was not correctly given. It was pointed out in the order that for transporting

sugar with regard to other districts, the appellant is facing no problem. Even in reply dated 28.11.1984, the appellant submitted that there is no reference to Kandla Port and, therefore, he will not lift from that area and further pointed out that he cannot be

held responsible for not carrying sugar from Kandla and requested to appoint an Arbitrator in this behalf. It is also required to be noted here that for December 1984, on the similar excuses, he failed to transport sugar. From the annexure to the order, it is very clear that in all 1511 tons quota of sugar lapsed, but as Mr. Shah submitted that 180 tons of sugar at item no.1 & 7 would not fall within contract period, atleast that 1331 tons sugar quota lapsed as a result of which people of Banaskantha were required to buy sugar from open market and they faced shortage of sugar during this period. In another annexure, the amount paid in excess is also indicated. In the instant case, what is required to be noted is that for the benefit of people at large, under the provisions contained in the Essential Commodities Act, sugar was required to be lifted for proper distribution at a cheaper rate. If a carrier neglects to transport the sugar in time, the people who were downtrodden will suffer a great. In our opinion, loss which they must have suffered, cannot be measured in terms of money because it would be difficult for this Court to calculate as to what amount the people must have paid in excess for buying sugar from open market. Those who are dealing directly or indirectly with essential commodities, they must discharge their duties in accordance with the agreement. In our opinion, the agreement makes it clear that the appellant was expected to lift the sugar from a godown not necessarily from a godown of a factory or from a factory, but from any godown or factory within the State or outside the State.

Mr. Shah further submitted that if at all the damage is suffered, the Government is not entitled to adjudicate upon the disputed question of breach of condition and power to assess the damage is confined only to the cases where breach is admitted. It is also submitted that the Apex court in the case of State of Karnataka v/s Rameshwara Rice Mills, Thirthahalli, reported in AIR 1987 SC 1359, considering the clause of agreement, observed that " for any breach of conditions set forth hereinbefore, the first party (contractor) shall be liable to pay damages to the second party (State Government) as may be assessed by the second party" and has pointed out the terms of the clause do not afford

scope for a liberal construction being made regarding the powers of the officer of the State Government to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach." Mr. Shah submitted that it is a disputed question whether breach is committed or not. Therefore, in our opinion, in view of this submission made by learned advocate, the petition has been rightly rejected by learned Single Judge. However, he submitted that it was open for the Collector to assess the damages. In the instant case, we pointed out earlier that the Collector was not a party to the agreement. Sangh who has been referred to as Nominee in the agreement and the appellant, have entered into an agreement and both of them authorised the Collector to decide as to what amount should be forfeited. No malafides are alleged against the Collector. The Collector is a public servant and if the matter which is

left to him has been decided independently, it cannot be said that his decision is bad or illegal. It appears that he has taken into consideration not only the amount which was required to be paid for carting, but he has also taken into consideration the quota of sugar which lapsed on account of inaction of the appellant. Details of lapsed quota forms the part of the order. In our view, therefore, the judgement cited would not help the appellant.

It is required to be noted that in the alternative Mr. Shah submitted that extent of damage should not exceed the loss suffered, that is to say, amount paid in excess for carting sugar. In his submission, only that much amount should have been forfeited by the Collector and not the entire amount. As we said earlier, the Collector has taken into consideration the quota which has lapsed and that is apparent as the same is the part of the order.

Mr. Shah submitted that in view of Apex Court's decision in the case of Union of India v/s Rampur Distillery & Chemical Co.Ltd., reported in AIR 1973 SC P.1098, the amount could not have been forfeited. The Court pointed out in that case that the amount deposited by way of security for guaranteeing the due performance of the contract cannot be regarded as earnest money. In that case, the breach of contract caused no loss to the appellant namely Union of India & others. The stipulated quantity of Rum was supplied to the appellant by the respondents themselves at the same rate. The appellant, in fact, made no attempts to establish that they suffered

any loss or damages on account of the breach committed by

the respondents. It is in view of this finding, it is very clear that the Apex Court considering this aspect, dismissed the appeal of the Union of India.

It is required to be noted that in every case of breach of contract, the person aggrieved by the breach is not required to prove the actual loss or damage suffered by him before he can claim the amount and the Court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of breach of contract. In cases of breach of some contract, it may be impossible for the Court to assess compensation arising from the breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. In the instant case, the Nominee who is not a party before the Court entered into an agreement with the appellant. The sum of Rs. 1 lakh was deposited for due performance of the contract. It is not only towards carting charges or the loss which might be suffered, this amount was deposited. It appears that with a view to see that there is proper distribution and that too of levy sugar, the amount was got deposited with a right to forfeit in case of breach of contract. Considering this aspect, we would not like to interfere with the order passed by learned Single Judge.

Mr. Shah, learned counsel for the appellant has submitted that no hearing was given to the appellant before the amount came to be forfeited. He submitted that non-arbitrariness is the essential facet of Article:14 pervading the entire realm of State action governed by Art.14. He submitted that the audi alterm partem facet of natural justice is also a requirement of Art.14. He further submitted that in fairness, respondent no.1 Collector should have heard him before passing the order. In the instant case, the appellant entered into an agreement with the Sangh and as per the agreement the Collector took decision in view of breach having been committed. The Apex Court, in the case of M/s Radha Krishna Agarwal and others v/s State of Bihar and others, reported in AIR 1977 SC 1496, pointed out that " But after the State or its agents have entered into the field of ordinary contract the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter-se. No question arises

of violation of Art.14 or of any other constitutional provisions when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract. The Apex Court pointed out that Patna High Court has rightly divided the types of cases in which breaches of alleged

obligation by the State or its agents can be set up into three types. These were stated as follows:-

"9(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Art.299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

For the sake of arguments as contended by learned Advocate Mr. Shah that the State was a party to the contract, even then this being a matter of contract, will have to be considered in view of the Apex Court judgment in the case of M/s Radha Krishna Agarwal (supra).

In the instant case, the case would fall under third category as it is a question of pure breach of contract. Apex Court in the case of Umakant Saran v/s State of Bihar, AIR 1973 SC 964, Lekharaj Satharam Das v/s N.M.Shah, AIR 1966 SC 334, has held that "no writ or order can issue under Art.226 of the Constitution in cases "to compel the authorities to remedy a breach of contract pure and simple".

In our view, the matter being governed by the law of Contract, matter was left to the discretion of the Collector to decide and when despite several notices if

appellant has not cared to discharge his duties, then in our opinion, when the matter is covered by the Contract Act, and even according to the appellant breach is committed by the party, interpreting the terminology of the contract is to be established, remedy for the appellant would not be a petition under Article 226 of the Constitution.

In the result, appeal fails and is dismissed with no orders as to costs. [At this stage, Court may observe that question raised before this Court being disputed question, when raised before the Civil Court, the findings recorded by this Court may not come in the way of either of the parties and the trial court, not only on the basis of the submissions made and documents produced before it, but on other evidence as well, will have to decide whether any breach was committed or not and, therefore, the trial court will have to consider the case on the evidence which may be placed before it if proceedings are initiated in accordance with law.]

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